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In the Supreme Court of the United States

OCTOBER TERM, 1980

JANE NIDIA JIMENEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that agents of the Drug Enforcement Administration violated her Sixth Amendment rights by interfering with her relationship with her attorney after her arrest. She also argues that the warrantless search of a paper bag found in the trunk of her car violated the Fourth Amendment.

1. Following a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of possessing more than 1000 grams of a substance containing heroin, with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).

She was sentenced to five years' imprisonment, all but six months of which was suspended in favor of probation. She also received a concurrent three-year term of special parole (Pet. App. 9).

The facts of the case are summarized in the opinion of the court of appeals (Pet. App. 1-7) and in a prior opinion of that court, 602 F.2d 139 (7th Cir. 1979). Beginning in late 1976, DEA agents obtained information connecting petitioner to large-scale drug transactions in the Chicago area. Surveillance of her activities over an extended period supported the agents' suspicions. On October 25, 1977, the day of petitioner's arrest, the agents saw her take a brown paper bag under suspicious circumstances from a person driving a car through the parking lot of a restaurant known to be a site of drug transactions. Petitioner placed the bag in the trunk of her car and drove away. The agents stopped petitioner's car and asked her what was in the paper bag. She replied, "You know what it is." One of the agents then opened the trunk of the car and looked in the paper bag. He discovered 40 one-ounce packages of heroin (Pet. App. 2-3; 602 F.2d at 140-141). Petitioner was arrested at that time.

The court of appeals held that the warrantless search of the paper bag was lawful (Pet. App. 3-5). Following the Eighth Circuit's decision in *United States* v. *Neumann*, 585 F.2d 355 (1978), the court held that petitioner did not have a sufficient expectation of privacy in the paper bag to require that a warrant be obtained before the bag could be searched. With respect to petitioner's contention that the opening of the trunk of her car was not supported by probable cause, the court noted that it had resolved that question against petitioner in its earlier opinion

in the case (602 F.2d at 142), and it declined to re-examine its previous decision.[1]

2. Petitioner contends (Pet. 11-14) that under this Court's ruling in *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), the warrantless search of the paper bag was unlawful. As the court of appeals held, however, petitioner failed to establish that she had a reasonable expectation of privacy in the paper bag.

In *Arkansas* v. *Sanders*, *supra*, the Court held that a warrant should have been obtained before police searched a piece of personal luggage seized from an automobile. In the course of its opinion in *Sanders*, the Court explained that the privacy expectation ordinarily associated with luggage is what triggers the warrant requirement. As the Court observed (442 U.S. at 762), "luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." See also *id.* at 764 ("the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them"); *United States* v. *Chadwick*, 433 U.S. 1, 13 (1977). The Court noted, however, that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment." The holding in *Sanders*, the Court made clear, applies only to personal luggage. 442 U.S. at 764-765 n.13. See also *id.* at 767 (Burger, C.J., concurring in the judgment); *id.* at 772 (Blackmun, J., dissenting).

While personal luggage is the kind of container in which the expectation of privacy is greatest, paper

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[1] Petitioner now does not contend that the stop of her car or the search of the trunk was unlawful. Her argument is confined solely to the lawfulness of the search of the paper bag.

bags fall at the opposite end of the spectrum. Accordingly, every court of appeals that has addressed the issue has concluded that a warrant is not required to justify the search of a paper bag. See *United States* v. *Mackey*, 626 F.2d 684 (9th Cir. 1980); *United States* v. *Goshorn*, 628 F.2d 697 (1st Cir. 1980); *United States* v. *Ross*, No. 79-1624 (D.C. Cir. Apr. 17, 1980), rehearing en banc denied (Oct. 8, 1980); *United States* v. *Mannino*, No. 80-1206 (2d Cir. Nov. 18, 1980); cf. *United States* v. *Neumann*, *supra* (cardboard box). The court of appeals here acknowledged that "a set of facts certainly may exist where an individual has a high expectation of privacy in the contents of a box or perhaps a paper bag" (Pet. App. 5). The court held only that, under the circumstances presented, in which petitioner had already told a DEA agent that the agent knew what was in the bag, she did not retain a reasonable expectation of privacy in the bag's contents. Further review of this reasonable and highly fact-bound conclusion is not warranted.[2]

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[2] Petitioner's reliance on *United States* v. *Dien*, 609 F.2d 1038 (2d Cir. 1979), is misplaced. That case involved closed, taped cardboard boxes, in which the court found that the defendants had a legitimate expectation of privacy. A paper bag is less frequently associated with the preservation of privacy than a taped cardboard box; it is more often used simply as a convenient device to transport ordinary items rather than to shield personal effects from public view. Petitioner's assertion that the paper bag in this case was "closed" (Pet. 12, 13, 14) adds nothing to the analysis. If the bag had been open, of course, the drugs would have been in plain view. To say that the bag was "closed" is simply to say that its contents were not visible from outside the bag. It does not suggest that petitioner took pains to secure the bag in any significant way. For this reason, the fact that the bag was "closed" does not make it analogous to the locked trunk in *Chadwick* or even the taped boxes in *Dien*.

3. Petitioner also contends (Pet. 6-11) that one of the DEA agents violated her Sixth Amendment right to counsel by encouraging her to cooperate with the DEA after her arrest and by discouraging her from informing her court-appointed attorney about her cooperation.

The evidence before the district court showed that after her arrest petitioner agreed to cooperate with the DEA in its investigation of the other persons involved in the drug transaction for which she had been arrested. Her court-appointed attorney was not informed of her cooperation. There is an unresolved dispute about whether the decision not to inform the attorney originated with petitioner or the DEA agent. The DEA agent testified that petitioner asked that her attorney not be informed of her cooperation; petitioner testified that the DEA agent advised her not to tell her lawyer about her cooperation. A few days later, petitioner ceased cooperating with the DEA and informed her attorney about her post-arrest dealings with the agents (Pet. App. 5-6).

The district court denied petitioner's motion to dismiss the indictment, and the court of appeals affirmed, noting that petitioner was not prejudiced in any way by the agent's conduct. No information obtained during the brief period of cooperation was used against petitioner, and the court held that, in the absence of any showing of prejudice, dismissal of the indictment was not appropriate (Pet. App. 6).

Petitioner asserts (Pet. 9) that the holding of the court of appeals is contrary to that of the Third Circuit in *United States* v. *Morrison*, 602 F.2d 529 (1979), cert. granted, No. 79-395 (June 30, 1980). In *Morrison*, the court of appeals held that because of alleged interference by DEA agents in

the relationship between a defendant and her attorney, the indictment had to be dismissed, even absent any showing of prejudice. In the present case, however, the DEA agent's conduct—even according to petitioner's account—is not nearly as objectionable as the conduct at issue in *Morrison*. In particular, there is no allegation whatever that any government employee disparaged the abilities or motives of petitioner's attorney or urged petitioner to obtain different counsel. In this respect, the case is much like *United States* v. *Glover*, 596 F.2d 857 (9th Cir.), cert. denied, 444 U.S. 860 (1979), in which this Court denied review after *Morrison* was decided by the Third Circuit and after the government had announced its intention to petition for a writ of certiorari in that case.

We believe that the same disposition is appropriate here. Even if the Court should determine that dismissal of the indictment is an appropriate sanction for the government misconduct in *Morrison*, a similar result would not be required in the present case. The Third Circuit in *Morrison* did not hold that dismissal is required whenever a government agent asks a defendant not to reveal something to his or her attorney, nor do we understand respondent in *Morrison* to advocate such a rule. Accordingly, the outcome in *Morrison* is not likely to be controlling here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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